BRIAN WALKER LAW FIRM, P.C.

BRIAN A. WALKER*
TRAVIS D. SPEARS**
*Licensed in Washington and Oregon
Licensed in Washington and Idaho

July 19, 2019

Court of Appeals, Division 2
950 Broadway #300
Tacoma, WA 98402

Re: Brandon Eugene Dockter v. State of Washington
Appeal No. 519283

Dear Court Clerk:

Enclosed for filing, please find Appellant's Reply Brief, pertaining to the above matter.

If you have any questions please do not hesitate to contact our office.

Sincerely,

Yesenia Piedra
Legal Assistant to
BRIAN A. WALKER
Attorney at Law

:ycp

Enclosure (1)

cc: Aaron Bartlett, Attorney for Respondent

* 210 E. 22nd Street, Vancouver, WA 98663 *
Telephone: (360)695-8886 Fax: (360)695-1926

No. 51928-3-II

IN THE COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRANDON EUGENE DOCKTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

Clark County Superior Court Cause No. 17-1-00524-0

APPELLANT'S REPLY BRIEF

BRIAN A. WALKER
Attorney for Appellant
Brian Walker Law Firm, P.C.
210 E. 22nd Street
Vancouver, WA 98660
brian@walkerlawfirm.com
(360) 695-8886

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REPLY ARGUMENT

A. *The prosecutor committed prejudicial misconduct by misstating the law regarding consent and capacity thereby shifting the burden of proof to the Defendant.*

In its Response, the State simply denies that the prosecutor's statement was a misstatement of the law. Specifically, the statement was that Washington State law imposes an affirmative duty upon a person to check to make sure that the other person is capable of consent before commencing sex with that person. Oddly, however, the State fails to set forth any authority or argument that the statement was a correct statement of the law. Rather, the State points out that the statement simply supported the State's theory of the case.

The State goes on to focus on the principle that alleged improper statements are to be viewed in the context of the entire argument, the issues of the case, the evidence and the jury instructions. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Indeed that is the law. It is the examination of the context in which the statements were made that illustrates just how inappropriate and prejudicial the misstatement was.

In evaluating a misstatement of the law in closing argument, the "context" in which it was made largely refers to whether it was responsive to the opposing party's argument. In *McKenzie*, a case alleging serial rapes by the defendant of his step daughter, the alleged improper statements there referred to the prosecutor

expressing an opinion as to the guilt of the defendant. There, the Court found that the prosecutor in each instance of alleged misconduct was "responding to defense counsel's closing argument, and interpreting the evidence". *McKenzie*, at 55. In our case, Mr. Dockter was under no duty to make sure Ms. Cornell was capable of consent. He only stated that he believed that she was, and that he had not performed a routine capacity check. Further, the argument in no way sought to interpret the evidence. It merely sought to place an additional burden upon Mr. Dockter which he was unable to satisfy.

In *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014), a two-codefendant case, the prosecutor and one of the defense attorneys, in the presence of the jury, traded barbs and insults and engaged in extremely disrespectful and unprofessional behavior throughout the entire trial. The Court found the statements, on the part of both attorneys, "so obnoxious and so continuous that it permeates the record ... that it would be incredibly difficult to focus on the guilt or innocence with this grating noise in the background". However, the Court noted that the back and forth insults were largely considered responsive to one another and, "alone, probably [did] not require reversal". *Lindsay*, at 433-4. It was not until the *Lindsay* prosecutor likened the State's burden of proof to a partially completed jigsaw puzzle that misconduct warranting reversal was found.

The prosecutorial misconduct found in *Lindsay* was deemed "great prejudice" as it reduced the State's burden and undermined the defendant's due

process rights. Id, at 434. This is particularly so, as will be discussed further below, as the statements came from a prosecutor who is held to a higher standard. Id, at 443-4.

To show prejudice by such misconduct, a defendant must show a substantial likelihood that the prosecutor's statements affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). In *Lindsay*, the Court noted, in regard to context, that the prosecutor's jigsaw puzzle argument was "not directly preceded by any statements from defense counsel to which the prosecutor was responding". *Lindsay*, at 443. Such statements may "not be grounds for reversal when specifically provoked by defense counsel". Id, at 443, citing *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956).

In *Lindsay*, however, the prosecutor's argument in closing misstated the law, sought to reduce the State's burden, and was not precipitated by any statement from defense counsel. The statements were isolated in the context of the trial and therefore constituted misconduct.

Misstatements of law in closing are especially egregious when coming from a prosecutor who is held to a higher standard and who owes a duty to defendants "to see that their rights to a constitutionally fair trial are not violated". *Lindsay*, at 443, quoting *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). More egregious still in this case, the misstatement of the law placed an additional burden on Mr. Dockter which was sanctioned by the court when it

overruled the objection and instructed the prosecutor to "go ahead", who then reinforced the misconduct immediately thereafter.

As far as the instructions and issues being addressed by the State, no instruction addresses a defendant's burden to affirmatively "check" for capacity. One does not exist. The only claim that Mr. Dockter bore that duty under the law was when the prosecutor stated it in her closing. True, Mr. Dockter did testify that he had not checked, but that evidence was not directly addressed by any instruction. The issues in this case were whether the alleged victim was capable of consent and whether Mr. Dockter *reasonably believed* that she was -- not whether he had *checked to see* that she was. The context in which the misstatement was made was in closing and not in response to any statement by defense counsel.

Further, to say that a person who is asleep or in a dreamlike state is physically helpless and/or mentally incapacitated "as a matter of law", is further incorrect. Though a jury's determination that an alleged victim was asleep is sufficient under the law to establish physical helplessness, a jury is not required to so find. Especially when the alleged victim claims that she slept through a half hour of sexual intercourse.

Also, a "dreamlike state" is not addressed in the case cited by the State, *State v. Puapuaga*, 54 Wash.App 857, 776 P.2d 170 (1989), and this writer is not aware of any case that does. Therefore, to say that the prosecutor's statement, "if

you are convinced that [AC] was asleep or in a dream-like state, either of those qualify" to establish that AC was not capable of consent, is incorrect. Regardless, the argument misses the point of whether the prosecutor's claim that Washington law imposes a duty to check for capacity was a misstatement of the law. It was. The misstatement was made in closing and was prejudicial.

As for a motion for a mistrial, such motion is not a required act to preserve an error. In the absence of an objection, however, it may serve as a substitute to preserve an issue on appeal. *Lindsay*, at 431-32. Here, defense counsel properly and timely objected, therefore, whether he made a motion for a mistrial is irrelevant.

The prosecutor's misstatement of the law did not address an argument made by defense counsel. Nor did it interpret evidence in any way supported by law. When viewed, especially in the *context* of this trial, the statement is incorrect and amounts to prosecutorial misconduct which prejudiced Mr. Dockter's due process right to a fair trial.

Regarding the evidence of guilt, it was further far from overwhelming. On the contrary; the uncontroverted evidence was, according to Ms. Cornell, Ms. Cavanaugh and Mr. Dockter, that he and Ms. Cornell engaged in sexual intercourse for approximately one half hour before Ms. Cornell objected. After 30 minutes, she reached behind her and felt the shorter-than-Sam Harper's hair; felt the stubblier-than-Sam Harper's face when they kissed; and heard the other-

than-Sam Harper's voice when he spoke. It was only upon the realization that the person behind her was not Sam Harper that Ms. Cornell did not consent to the sexual contact. A jury could well have believed that Ms. Cornell indeed consented to the sexual contact, but only objected once she became aware that the person she was having sex with was someone other-than-expected.

A new trial is required, free of misstatements of the law which place an impossible burden upon Mr. Dockter. Only this would ensure that Mr. Dockter's Due Process rights are honored.

B & C (combined). ***The Court erred by giving the jury an instruction on the definition of consent, WPIC 45.04, and Defense counsel rendered ineffective assistance of counsel when he proposed and argued WPIC 45.04.***

To be clear, Mr. Dockter's argument regarding instructional error is not that the court erred in giving WPIC 45.04 alone, but that it did so based upon the defense attorney's ineffective assistance of counsel.

The State argues that Mr. Dockter invited the error of giving the improper instruction. It is true that a defendant who requests, and is given, an instruction which complies with then existing published Washington Pattern Jury Instructions cannot later complain that the instruction was given in error. For support, the State relies upon *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999).

State v. Studd was a case which consolidated six criminal cases, five being homicide cases and one being an attempted homicide. The common thread between the six cases was the verbatim use of then-existing WPIC 16.02, a pattern jury instruction promulgated by the Committee which was later deemed misleading as it did not make it clear that a defendant claiming self defense need not prove that the danger perceived was actual danger. The general holding in four of the six consolidated cases was that a criminal defendant who requests a pattern jury instruction which, at the time the request, was an approved instruction, cannot later complain that it was given in error. See generally *Studd.* Nor can a defendant complain of ineffective assistance of counsel for proposing such an instruction. However, where a decision has been handed down declaring the instruction to be inappropriate or misleading *prior to* the request, a claim in ineffective assistance can be made and will avoid the bar of the invited error doctrine. This is the holding in one of the six consolidated *Studd* cases, *State v. Bennett*, 87 Wash.App. 73, 940 P.2d 299 (1997).

In *Bennett*, the count noted with approval the Court of Appeals' holding that "invited error does not bar review a claim of ineffective assistance of counsel based on such an instruction". *Studd*, at 551-2. In *Bennett*, the Supreme Court noted that "[b]y framing his argument [as ineffective assistance of counsel], Bennett avoids one thicket (the bar of the invited error doctrine) only to become entangled in another (the presumption of effective assistance of

counsel)". *Studd*, at 552. Bennett's attorney was determined to have not rendered ineffective assistance because the misleading instruction had not yet been deemed defective at the time of the request. In our case, however, *W.R.* 181 Wn.2d 757, 336 P.3d 1134 (2014), which declared WPIC 45.04 to be an improper and misleading instruction in a Rape in the Second Degree case based upon incapacity, had been a published case for three and-a-half years before Mr. Dockter's trial. Moreover, more than two years before Mr. Dockter's trial, the comment in the Washington Practice Series, Volume 11, Pattern Jury Instructions Criminal regarding WPIC 45.04 had been published. The comment, published in December, 2015, stated that the instruction was "generally not appropriate ... [because] [e]xcept in unusual cases, an instruction on consent may confuse the jurors about the burden of proof, without providing them meaningful guidance".

To request that instruction which placed an additional burden on Mr. Dockter, especially when the prosecuting attorney voiced concern and placed the defense attorney on notice, could have served no legitimate strategic or tactical purpose. The request for the instruction was an act falling below an objective standard of reasonableness based on consideration of all the circumstances at trial. The performance was deficient and Mr. Dockter's right to a fair trial was prejudiced. Requesting the instruction was error which was due to ineffective assistance of counsel. The remedy is remand for a new trial.

D There was insufficient evidence to establish the element of mental incapacity as to the charges of rape in the second degree as well as indecent liberties.

Mr. Dockter adds nothing on this issue beyond what was set forth in his original Brief.

CONCLUSION

For all of the reasons above, the Defendant's conviction should be reversed for a new trial.

DATED this 19 day of July, 2019.

Respectfully Submitted,

BRIAN A. WALKER, WSBA # 27391
Attorney for Appellant Dockter

CERTIFICATE OF SERVICE

I certify that I have provided a copy of the Appellant's Opening Brief by first class mail on the below-named, by mailing to said individuals copies thereof, contained in sealed envelopes, with postage prepaid, addressed to said individuals at said individuals' last known addresses as set forth below, and deposited in the post office at Vancouver, Washington on said day.

By way of United States Postal Service, First Class Mail to the Following:

AARON BARTLETT, ATTORNEY FOR RESPONDENT
CLARK COUNTY PROSECUTING ATTORNEY
PO BOX 5000
VANCOUVER, WA 98666

BRANDON DOCKTER DOC# 405580
COYOTE RIDGE CORRECTIONS
PO BOX 769 CONNELL, WA 99326

Dated this 19 day of July, 2019

YESENIA PIEDRA